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No. 07-1201

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In The

Supreme Court of the United States

IN THE INTEREST OF:
K.M.H., A Child Under the Age of Eighteen
And
K.C.H., A Child Under the Age of Eighteen
IN THE MATTER OF THE PATERNITY OF:
K.C.H. and K.M.H. by and through their next friend,
DARYL D. HENDRIX,

Petitioner,

v.

SAMANTHA HARRINGTON,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Kansas

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Human artificial insemination originated as a means by which married couples who had encountered problems with fertility could bring children into the world and perpetuate their families, and as such, is not an evil. However, the Kansas Supreme Court, through a mechanistic application of a "generative statute of frauds" has worked a decided evil by treating two children who had no voice in the means of their conception as chattel, divesting them from the only father they have, severing them from strong and elemental biological ties which cannot be discounted as meaningless, and alienating them from the love, affection and support of an honorable man who took every possible step to see them come into the world, and grasped every opportunity available to him to be their father.

Petitioner maintains that the Kansas Statute in issue is unconstitutional, as applied to the facts of his case.[1] Kansas has enshrined one parent's purported

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[1] In Page 12 of her Response, S.H. seeks to build a straw man. S.H. maintains that granting the writ would put at risk the ability of states to facilitate insemination by known donors. If it was not made clear in the initial Petition, it should be emphasized here that D.H.'s challenges to the Kansas Statute are made as applied by the Kansas Supreme Court, and are made in the context of a known donor *who had no intention of waiving his parental rights or of having his parental rights cut off ab inito.* The specter of a shortage of known donors who make a truly informed decision to contribute to the conception of children without making a claim to parental rights and accepting parental and financial responsibilities should alarm no one. It would appear that taking S.H.'s argument to its logical conclusion, that the only way that a known donor would be

"right" to have children free and clear from their father, to the detriment of the children's best interests. In doing so, the Kansas Supreme Court has violated the father's and his children's rights to substantive and procedural due process and equal protection as guaranteed by the Constitution of the United States, which are their birthrights as natives of this land.

REASONS FOR GRANTING THE PETITION

Respondent's presentation of this case is flawed in that she repeatedly and persistently mischaracterizes the circumstances of the conception of the children as an antiseptic "medical procedure," a virtual parthenogenesis, with Petitioner relegated to a role of near total insignificance. In addition, Respondent has made an untenable argument that Petitioner has waived the children's constitutional claims. However, the fundamental problem with Respondent's legal position, and the fundamental flaw in the core legal holding of the Kansas Supreme Court is that as applied, the provision for a writing is deemed to be so conclusive and determinative as to cut off parental rights as a matter of law.

The Kansas Supreme Court has decided an important federal question in a way which is in sharp conflict with the holdings of other courts of various States, and of the holdings of this Court. This conflict, in and of itself, brings this cause within the ambit of

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involved in artificial insemination would be if he were somehow duped into participation.

Supreme Court Rule 10, and warrants the granting of the Petition for Certiorari. Further, the Kansas Supreme Court has decided an important question of federal law that has not, but should be settled by this Court.

I. This Court Should Grant The Petition Because There Is A Conflict Between The Kansas Supreme Court And The Holdings of This Court With Respect To The Termination of A Fundamental Right, And The Holdings Of Several State Courts of Last Resort That Have Interpreted Similar or Analogous Statutes, and Have Reached Contrary Results which Implicate the Petitioner's Substantive and Procedural Due Process Rights.

To date this Court has not directly addressed a case involving parental rights in the context of artificial insemination. Only four cases decided by this Court even mention the words "artificial insemination."[2] However, this Court has held conclusively that having children is a fundamental liberty interest. This Court has in its past holdings found that rights to raise one's children, are fundamental, and cannot be severed without due process. *Stanley v. Illinois*, 405 U.S. 645

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[2] *Marcus v. Search Warrants of Property at 104 East Tenth Street, Kansas City, Mo.*, 367 U.S. 717 (1961); *Roe v. Wade*, 410 U.S.113, 161 (1973) (*See* Footnote 62); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67 (1976) (*See* footnote 9),; and most recently in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

(1972), *Quillon v. Walcott*, 434 U.S. 246 (1978), *Caban v. Mohammed*, 441 U.S. 380 (1979), *Lehr v. Robinson*, 463 U.S. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000), *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989).

The facts of the instant case do not deal with an unmarried interloper intruding into the sanctity and stability of a two parent family. Instead, in issue is the application of a statute in such a way as to forever bar the existence of a paternal relationship, by means of a writing requirement, which as applied, acts as an irrebutable presumption of non paternity. The application of the statute by the Kansas Supreme Court runs counter to the holdings of several state courts of last resort, which, in examining similar fact patterns and analogous statutes, have safeguarded the substantive and procedural due process rights of known donors who wished to undertake parenting rights and responsibilities, by allowing evidence to be presented of the intent of the parties, even where such evidence of intent would be otherwise barred.

In the case of *K.M. v. E.G.* the California Supreme Court examined the right of a female gamete donor to present evidence of an oral undertaking to parent, even when she had signed a comprehensive written instrument at the time of the donation, waiving all of her potential parental rights. *K.M. v. E.G.* 37 Cal. 4th 130 (2005). This case dealt with a woman who had donated her eggs to her former lesbian partner so that the lesbian partner could bear a child. The *in vitro* fertilization was performed by a fertility clinic. The donor had signed a four page consent form on the

medical center's letter head entitled "Consent Form For Ovum Donor (Known). The form stated that the donor agrees "to have eggs taken from my ovaries, in order that they may be donated to another woman. . . . It is understood that I waive any right and relinquish any claim to the donated eggs or any pregnancy or offspring that might result from them. I agree that the recipient may regard the donated eggs and any offspring resulting therefrom as her own children. . . . I specifically disclaim and waive any right in or any child that may be conceived as a result of the use of any ovum or egg of mine, and I agree not to attempt to discover the identity of the recipient thereof." *Id.* at 135, 136. In the trial court proceedings, the birth mother testified that she would not have accepted the donor's ova if the donor had not signed the consent form, because the birth mother wanted to have a child on her own and believed the consent form "protected her in this regard." *Id.* at 136.

After the lesbian partnership broke down, the donor filed a legal action for custody and visitation. The superior court granted the birth mother's motion to dismiss, finding, in a statement of decision, that the donor "knowingly, voluntarily and intelligently executed the ovum donor form, thereby acknowledging her understanding that, by the donation of her ova, she was relinquishing and waiving all rights to claim legal parentage of any children who might result from the *in vitro* fertilization and implantation of her ova in a recipient . . . Her position was analogous to that of a sperm donor. The Court finds no reason to treat ovum

donors as having greater claims to parentage than sperm donors. . ." *Id.* at 136, 137.

The California Court of Appeal affirmed the judgment. *Id.* at 137. The Court of Appeal held that "the status of K.M. is consistent with the status of a sperm donor under the [Uniform Parentage Act], i.e., treated in law as if he were not the natural father of a child thereby conceived. . ." *Id.*

The California Supreme Court reversed, citing to its case of *Johnson v. Calvert*, 5 Cal. 4th 84, 87, 100 (1993).

The California Supreme Court in K.M.ruled that because two women each presented acceptable proof of maternity, "*we do not believe this case can be decided without enquiring into the parties' intentions.*" *Id.* at 142, citing *Johnson v. Calvert*, at 93. In overruling the trial court's holding that by signing a waiver form, the donor had thereby relinquished and waived all rights to claim legal parentage, the *K.M.* Court held that such an agreement could not be enforced, as it is "well established that parents cannot, by agreement, limit or abrogate a child's right to support." *Id.* at 145. Other related state supreme court cases which have allowed the introduction of evidence of the intent of the parties, even where the operative statute could be seen as acting as an absolute to parentage are *In Interest of R.C.*, 775 P.2d 27 (Colo. 1989), *In re: Marriage of Adams*, 133 Ill. 2d 437 (1990). These rulings speak to the high level of protection and care that need to be taken when addressing the termination of the fundamental liberty

interests involved in parentage and parent-child relationships.

If the carefully drafted waiver, (made available to both parties in the state where the donation took place, more than likely prepared by hospital attorneys) in the *K.M.* case cannot defeat parentage, neither should the instant statute, particularly in light of the fact that many of the safeguards incident to a "medical procedure," such as informed consent and execution of waivers were absent in this case, because the insemination took place in Missouri, a state where by operation of its laws D.H. would be legally the father, and consequently there was no incentive for the Missouri physician, who could have acted as a "gatekeeper" to advise D.H. about the provisions of the Kansas statute. D.H. Trial Court Memorandum Brief, p. 6.

On pages 16-17 of the Response, Respondent mischaracterizes the fundamental right involved in this case as the parental right of a "donor of sperm used in a medical insemination . . . to parent any child conceived using that sperm." That broad characterization of the right does not adequately characterize the fundamental right at issue here. The fundamental right at issue in a case must be "carefully formulat[ed]" by the parties. *Glucksberg*, 521 U.S. at 722. The right at issue is the fundamental parental right of a father who has agreed with the mother to jointly raise a child conceived via artificial insemination, which merits substantive and procedural protection under the due process clause.

On Pages 17 and 18 of the Response, Respondent points out that a mere biological link is not sufficient to establish fundamental rights of parents. However, while a biological link, standing alone, is not sufficient to establish a father's parental rights under the Constitution, the *Lehr* Court recognized that the fundamental rights of a father attach when he "demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child." *Lehr*, 463 U.S. at 261. Here, Petitioner has made that showing. When Petitioner agreed to be an active part of his children's lives, his constitutional parental rights attached. In her Response, Respondent relies heavily on *Lehr* in an attempt to defeat Petitioner's claim to parentage. *Lehr* can be distinguished. The putative father in the *Lehr* case "did not seek to establish a legal tie until after [his daughter] was two years old." *Id.* at 262. Here, D.H. has desperately sought his parental rights from the time his children were born-e.g., he filed his paternity suit two weeks after their birth. The New York statute in *Lehr* involved a step that could be unilaterally taken by the father, namely, the mailing of a postcard to the putative father registry. Here, the Kansas statute requires a writing that must be signed and agreed to by the mother. This bilateral step, which cannot be taken solely by the father, does not provide the father the same type of protection afforded by the New York law in *Lehr*. Further, the safeguards normally attendant to a medical procedure, which involve informed consent and record keeping, were not present here. There is no definition in the Kansas statute for the type of writing

required, and how it will be recorded and safeguarded. The statutory provisions as to the writing are therefore unconstitutionally vague. The statute in *Lehr* provided for a mechanism for putting the world on notice of a putative father's desire for notification, and of his claim to paternal rights. There was a bureaucracy in place, which could keep track of, record, and provide a permanent index of parental claims. This is missing in the Kansas scheme. On page 20 of the Response , Respondent maintains that "D.H.'s asserted ignorance of the writing requirement does not affect the constitutional analysis." Petitioner agrees that his ignorance of the law does not affect the constitutional analysis. It is not his ignorance of the law that creates the unconstitutional result; it is the unlawful presumption against fundamental rights created by the Kansas statute.

II. The Kansas Statute Violated Petitioner's Rights to Equal Protection

Respondent states that "D.H. does not pursue any argument that the Kansas Donor Statute impermissibly discriminates based on gender." Response, p. 27. In response, Petitioner is making that argument in addition to the equal protection argument based on the fundamental right to parent one's child. In the same page Respondent states that "[M]ales as sperm donors and females as recipients are not similarly situated" Yet they are similarly situated for purposes of maintaining their constitutional parental rights: they both contribute to the biological endowment of the child, and both should have an equal opportunity to share in the

upbringing of that child by exercising their parental rights. This statute offends equal protection by giving the mother veto power after the birth of the children, as a plain reading of the statute does not rule out an agreement to co-parent, even years after the children's birth.

III. This Court Can Properly Consider the Constitutional Rights of the Children, Whose Rights to Filiation, Child Support and Paternal Involvement and Inheritance Were Summarily Severed Without Due Process or Compelling Justification.

This Court can properly consider the constitutional rights of the children This case is a paternity suit. Without citing authority, S. H. contends that D.H. did not properly preserve the rights of the children by asserting constitutional claims on their behalf in the lower courts. Generally, issues must be raised in lower courts in order to be preserved. This principle does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469, (2000). In his Trial Court Memorandum, D.H. discussed a Texas case, wherein a father was found to have standing to litigate the issue of paternity. (Memorandum p.4, 5, citing to *In re: Sullivan*, 15 S.W. 3d 911 (Ct. App. Texas 2005). D.H. further addressed the issue of the constitutionality of the Statute, and discussed an Ohio case which examined public policy supporting the concept of

legitimacy and the concomitant rights of a child to support and inheritance. (Memorandum Brief of Daryl D. Hendrix, p. 7, citing *C.O. v. W.S.*, 639 N. E. 2d 523 (1994). In his Motion for Rehearing before the Kansas Supreme Court, D.H. raised specific constitutional violations surrounding the constitutionality of the Kansas statute as applied to the children. The Kansas Supreme Court had an opportunity to review and decide on these issues; however, the Kansas Supreme Court denied the Motion for Rehearing without a detailed opinion. This Court has repeatedly recognized that the "interest primarily at stake in [a] paternity action [is] that of the child," *Pickett v. Brown*, 462 U.S. 1, 16 n.15 (1983) ; *see also Little*, 452 U.S. at 13; and "it is the child who has an interest in establishing a relationship to his father," *Pickett*, 462 U.S. at 16 n.15.Children are unable to assert their own rights; this Court must be vigilant in protecting the rights of those who are unable to do so.[3]

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[3] Respondent argues that the silence of the GAL bespeaks acquiescence to the result. However, on April 24, 2008, Andrey Filipowicz, one of Petitioner's counsels, spoke with the GAL who confirmed that while he did do not intend to file a response to the petition for a writ of certiorari unless one was requested by the Court, he stated that the procedural posture of the proceedings below in the Kansas District Court and the Kansas Supreme Court led to a situation where the best interests of his clients were not evaluated or considered, and he believed that it would be in his clients' best interests if this matter were further evaluated and considered by this Court, so that a determination of the issues would be made on their merits, under an analysis which would take the best interests of his clients into consideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Stacie Dallio died tragically and unexpectedly at the age of 31 on July 4, 2008. Stacie came to the United States from Southeast Asia at the age of two with her parents. Realizing one of her lifelong goals, she was admitted to practice law in September of 2005. Her friends and colleagues wish to acknowledge with gratitude her contribution to the Petition for Writ of Certiorari and the instant Reply in this case. Words cannot convey the sadness and loss we feel at her passing.